United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2207,8,9,10

ORIGINAL
WITH PROOF
OF SERVICE

To be argued by
LAWRENCE STERN

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM BRANDT, et al.,

Defendants-Appellants.

P/S

ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT GOLDSTEIN

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- :

WILLIAM BRANDT et al. DOCKET NOS. 74-2207-10

:

and

MARVIN THOMAS GOLDSTEIN, :

Defendants/
Appellant. :

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ISSUES PRESENTED

1. Whether appellant's presence in an apartment did not permit a fair preponderance finding or a beyond a reasonable doubt verdict that he was a member of multiple conspiracies, and whether he was prejudiced on the conspiracy and substantive counts by the joint trial on single conspiracy and Pinkerton theories submitted to the jury amid the plethora of inadmissable hearsay declarations.

2. Whether appellant was deprived of a fair trial when the court elicited, repeated and highlighted in its own examination of witnesses the most arguably damaging evidence against him.

3. Whether in the absence of probable cause, warrant exigencies and voluntary consent, the intrusion into the apartment, arrest and search therein were violative of the Fourth Amendment.

STATEMENT PURSUANT TO RULE 28 (a)(3)

A. Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York [Pollack, J.] rendered on September 9, 1974, convicting appellant, after trial by jury, of conspiracy to violate the drug laws and of possessing with intent to distribute 4,000 units of LSD [21 U.S.C. §846, 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(B)] and sentencing him to concurrent sentences of six months on each count.

Timely notice of appeal was filed, and this Court assigned Irving Cohen as counsel on appeal.

B. Statement of Facts

Appellant was named with nine others in an indictment charging conspiracy and substantive violations of the drug laws. Appellant was charged in the conspiracy count and alone in one count of substantive possession (LSD). He was tried together with four others named in the indictment, David Ross Miley, Joseph Raymond Wengler, Dean Peter Vavarigos, and David Flores, all charged in the conspiracy, Flores and Vavarigos in one substantive count (the drug, PCP), Miley in two substantive counts with others not on trial (the drug, LSD), and Wenzler alone in one count (the drug, LSD).

The Suppression Hearing

Robert Nieves, a DEA agent, testified that at 4:00 P.M. on February 12, 1974, he met a man known to him then as Strider

(later identified as Robert Bachia, charged in the indictment, but not tried with appellant). At the apartment of William Brandt (charged in the indictment, but not tried with appellant), Strider sold the agent 1,800 dots (single dose units) of LSD for $1,660. After the sale, the agent and his partner, Palumbo, drove Strider to the vicinity of 4th and the Bowery, where Strider exited the vehicle and disappeared walking westward on 4th Street. At 4:30 P.M. Strider returned to the agents' vehicle (H. 14-20)*.

Once back in the vehicle, Strider delivered 10,000 more dots of LSD to the agents. No money was exchanged because the agents then arrested Strider. They handcuffed him, drew their guns on him, and with the assistance of two other agents who were called to the scene, searched him on the street. In the car, the agent read Strider the Constitutional rights, got the "impression" Strider understood them and told Strider, "it would be helpful to him, certainly, if he cooperated." (H. 26-27). Strider then said his real name was Bachia and that he would cooperate (H. 3-4, 20-27).

Strider had already told the agents that he could not deliver an expected 40,000 more dots, that "the only thing he had was the first installment, ten thousand, that his people had gotten rid of the other -- the remainder of the 50,000, but that, I believe he said, Thursday night he could fulfill the other forty thousand commi t ment." (H. 19) After the arrest, Strider told them the 10,000 dots came from Mel who lived at 56 East 4th Street, and that he was scheduled to meet Mel immediately at a St. Marks

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* "H" numbered references are to pages in the hearing minutes.

Place restaurant called Iggy's Corner. The agents and Strider went to Iggy's Corner and waited for Mel. When Mel didn't appear, the agents decided to try 56 East 4th Street. Strider gave them a description, and the agents waited in their parked automobile while Strider went to the door of the building, knocked, and engaged a man who fit Mel's description in conversation (H. 405, 28-33).

Agent Nieves, with two other plainclothes agents, guns drawn, approached the foor, pushed Strider out of the way, and announced he was a federal agent and that Mel was under arrest. The door was closed on the agent's hand, but with the help of the other agents, he was able to push it open, and, after a short scuffle, subdue, arrest and handcuff "Mel" at the door. The agents then took him further inside the apartment, beyond a 3-5 foot partition, and sat him down (H. 33-35); and, "at that time he stated his name was Marvin Goldstein and that he was the owner of the apartment, and that he was alone in the apartment. So, I sat Mr. Goldstein down and advised him of his rights." (H. 6, 31-33). Appellant then asked to see a search warrant which the agents had not procured. There were a total of six agents in the apartment by this time, some of whom may have had their guns drawn (H. 34). Agent Thomas Sheehan testified that he did have his gun drawn (H. 58); the United States Attorney conceded that a third agent would also testify that his gun was drawn (H. 62)*.

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* At the trial, Agent Palumbo, not called by the government on the hearing, testified that he drew his gun at the door (T.399)

When appellant asked for the search warrant, agent Nieves "might have said they were going to get the warrant anyway;" he "heard talk about that" (H. 36-37) Later, at the trial the agent testified,

> I don't recall telling it to him myself, but it was told to him that we had intentions of getting a search warrant for his apartment... [and] by the time we get a search warrant he would not be there. (T. 328-329).

After this conversation, ten to fifteen minutes after the agents had entered the apartment, appellant, who told the agents he wanted to be present during the search, signed a consent-to-search form (H. 7, 11-13). The agents then seized from a shelf an aluminum foil packet which they had noticed upon entering the apartment and which was an aluminum foil packet similar to the previous packets transferred to the agents by Strider. This packet was ultimately analyzed to contain 4,000 dots of LSD and became the subject of the substantive possession count against appellant. The agents also found under the mattress in the apartment the money they had, earlier in the afternoon, given to Strider for the initial 1,800 dot purchase (H. 7-12).

Agent Thomas Sheehan was surveilling Strider and the agents on February 12. He saw Strider walking down East 4th Street, but lost him. Ten minutes later, he was Strider exit a store called Shesh Pesh, "after East 4th" Street, and meet agents Nieves and Palumbo (H. 44-45).

When Strider was arrested in the agents' vehicle, Agent Sheehan sat in the back seat with Strider. He didn't "see" any

rights advice, but there was a lot of conversation about Mel (H. 52).

Agent Sheehan assisted in pushing open the door at 56 East 4th Street, and pushed appellant against a wall (H. 57). After appellant signed the consent form, the agent asked appellant if there were any valuables he wanted secured, and appellant said there was a pouch of money on the wall; the agent seized it. (H. 47).

The testimony on the hearing thus concluded, counsel for appellant argued that the warrantless search of the apartment was not justified by any of the recognized exceptions to the warrant requirement; that there was no probable cause for the arrest or search, that the arrested Strider had not been shown to be a reliable informant or to have provided reliable information; that there were no exigent circumstances requiring the search after appellant's arrest at the door, that the consent was involuntary, and that an innocuous tin foil packet did not justify a plain view seizure (H. 62-67). The motion to suppress was denied, the Court ruling:

> It has been clearly and convincingly shown that there was ample probable cause for an arrest, and the consent to search given by the defendant Goldstein was, in fact, voluntarily given, and the search was reasonably conducted within permissable areas and was not the result of duress or coercion, express or implied, or beyond the reasonable limits of a proper search, (H. 67-68).

The Trial

At the conclusion of the suppression hearing and again at the start of the trial, counsel moved to dismiss the indictment on grounds of improper joinder, bad faith prosecution on the single conspiracy count, and for lack of evidence of a single conspiracy (there had been a prior trial ending in a hung jury) (H. 68 et. seq., T. 2-3*) ** Following the denial of this motion, counsel objected to hearsay statements of alleged co-conspirators, and the Court replied that these statements would be received subject to connection and the Court's ruling at the end of the government's case, and the Court so instructed the jury (T. 33-35, 203).

Michael Starbuck testified that sometime in 1971, he entered into an agreement with William Brandt and others to smuggle cocaine from South America. Starbuck was responsible for the major part of the financing of the deal, and he advanced at least $5,000. When trouble developed, he flew to Bolivia to attempt to straighten out matters, but the deal collapsed, at least as far as he knew. He lost his $5,000, received a zero return on his investment, and was arrested in October-November 1973. On the day of his arrest he agreed to cooperate with government agents, to help them arrest buyers and sellers of narcotics. They paid him his out-of-pocket expenses and promised that his cooperation would be made known to the judge. At the

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* "T" numbered references are to pages in the trial transcript.
** The Court ruled at the start of the trial that objections would be applied to all defendants (T. 5)

time of the instant trial, he had been indicted and would eventually plead guilty (T. 36-37, 55-58).

Soon after his arrest, and in his new role as undercover informant, Starbuck, on November 3, 1973, met with William Brandt at the Village Plaza Hotel and discussed with Brandt the purchase of marijuana and LSD. On November 12 Starbuck drove with Brandt to Woodstock to look for a connection, but the connection was not found. On November 23, Brandt told him that LSD could be procured from John Godinsky and gave him a 3 dot (dosage unit) sample. On November 26, Starbuck met with agent Palumbo of the DEA and turned over the sample. On November 27, in Brandt's hotel room, Starbuck introduced DEA agent Robert Nieves as a customer for LSD. Brandt was there, as were Godinsky and Miley. Godinsky produced 10 sheets of acid (100 dots each) which were given to the agent who gave $650 to Brandt. Brandt counted out a sum of money to Godinsky, who then left the room. The agent asked Brandt for more LSD (T. 32-33, 35-43).

On December 5, 1973, Starbuck met with Brandt and Jan Lang at Lang's apartment. There Starbuck negotiated for the purchase of THC (a marijuana concentrate) at $1,800 per ounce. Lang gave him a sample. On December 7, Starbuck gave this sample to agent Palumbo. On December 13, a meeting was held at Flores' apartment. Brandt, Flores and Vavarigos were there. Agents Nieves and Palumbo stayed in their automobile until Starbuck received permission through Brandt, who got it from Vavarigos, to allow one of the agents to come into the apartment. Agent Nieves went into the apartment, looked at the THC, weighed it, and paid

$1,800 for the one ounce to Brandt, who counted out a sum to Flores (T. 44-48).

On December 17, Starbuck and Miley, who was sent by Brandt in his stead, met with Vavarigos at the latter's apartment in Queens to discuss a cocaine sale. Vavarigos gave Starbuck a sample, which Starbuck identified in court (T. 49-51).

On January 4, Starbuck went with Brandt to Lang's apartment to discuss the purchase of LSD, "from another source," Lang (T.51). Brandt gave Starbuck a sample which he turned over to the agents on January 15. It turned out to be a form of LSD known as "purple haze". On January 15, Starbuck and Brandt and the agents, Nieves and Palumbo, met at Lang's apartment where it was agreed that the agents would go with Lang to his contact's apartment to obtain the LSD. Starbuck and Brandt did not go, but one half hour later, the agents came to Brandt's comic book store and, in Starbuck's presence, paid $200 to Brandt (T. 51-55).

Robert Nieves, the DEA undercover agent who was introduced to Brandt by Starbuck, testified to essentially the same events. In addition, he testified to a purchase of 3,850 dots from Godinsky on January 3 at the Village Plaza Hotel and, further, that on January 15, when he and Palumbo left Lang's apartment with Lang, they went to the apartment of Joseph Wenzler. From his apartment, Wenzler made two trips, bringing back and giving to the agents a total of 4,000 tablets of LSD (T. 204-216, 216-218).

On February 6, 1974, Nieves searched out Brandt at a second comic book store that Brandt was soon to open. There he inquired

of Brandt about a 50,000 dot LSD order that he had placed with Brandt for a purchase price of $16,500. Brandt said the order was coming and he'd let him know. When the agent asked if he could meet the connection, Brandt replied that Strider didn't want to meet anybody. On February 12, Nieves met Brandt at the comic book store to await the order. After some delay Strider (Robert Bachia) arrived and told Nieves that an initial good faith purchase of 1,800 dots for $600 would have to be made and that, thereafter, the 50,000 dot deal would be completed in 5 separate installments of 10,000 dots each, one after the other. Strider said this transaction would not take long, because his connection was in the neighborhood and the agents could drop him off nearby. The agents drove him to the intersection of 4th and the Bowery. The events that followed are contained in Nieves' suppression hearing testimony, supra, absent, of course, any reference to Strider's post-arrest statements to the agents. Identified by Nieves and admitted into evidence were the initial 1,800 dots purchased from Strider, the second batch of 10,000 dots, the 4,000 dots seized at the apartment wherein appellant was arrested and the $660 seized at that apartment, the serial numbers of which matched those of the money paid to Strider for the initial 1,800 dots. (T. 221-232)

After appellant's arrest, the agents returned to the comic book store and arrested Brandt and Miley, and later that day, they arrested Wenzler (T. 236-237).

Agent Nieves further testified that he never saw appellant

in personal possession of any drugs, and that prior to February 12, he'd never seen appellant or heard of him, or spoken to him, or bought any drugs from him or heard a description of him or heard that any other agents had negotiated with or bought drugs from him (T. 332-333).

At the conclusion of defense counsel's cross-examination of agent Nieves, the Court, on its own, asked the following questions and received the following answers objected to by counsel.

THE COURT: How many beds were there in this apartment?

THE WITNESS: One bed, as I recall, your Honor.

THE COURT: Was that a single bed or a double?

THE WITNESS: I think it was a double bed mattress.

THE COURT: Did it look like a single occupancy or multiple or double occupancy?

MR. COHEN: I object, your Honor. That is a conclusion on his part, He has no specific knowledge of that at all and it was not pointed out on direct.

THE COURT: All right. Your objection is correct. What did you observe as to the nature of the occupancy, if anything?

THE WITNESS: It appeared to be Goldstein's apartment alone.

THE COURT: And from what circumstances do you draw that inference?

THE WITNESS: Well, he stated that he lived there and we had no observations or any facts to prove otherwise.*

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*Nieves had just testified that appellant made no statements indicating his participation in any kind of conspiracy involving drugs (T. 333)

THE COURT: Did you notice whether there was a name on the door?

THE WITNESS: No, there was no name.

THE COURT: On the bell in any way?

THE WITNESS: No, sir. I don't recall. It was a storefront apartment and I don't recall any nameplate or anything of that type on the door.

THE COURT: All right.

(T. 333-334)

Counsel moved for a mistrial on grounds that the examination by the Court was improper redirect, since there had been no examination about this subject on direct or cross, and on the further ground that this examination indicated the Court's opinion to the jury. The motion was denied (T. 347-348).

Robert Palumbo, the DEA agent who accompanied agent Nieves on most of these transactions, gave generally corroborative testimony. In addition, agent Palumbo testified that on January 3, during the 3,850 dot LSD purchase from Godinsky at the Village Plaza Hotel, Palumbo had a conversation with Brandt. Brandt told the agent that Godinsky was going to California and, in the agent's words,

> since this deal had gone so well that this would put Mr. Brandt closer to Mr. Godinsky's supplier in that he was now going to be dealing with Mr. Godinsky's roommate, later identified as Robert Bachia, also known as Strider. (T. 384, 381-384)

On February 6, Brandt assured Palumbo in another conversation that the 50,000 dot LSD deal would be from the same source, whom Brandt named as Strider; he said Strider did not like to meet strangers (T. 393).

On February 12, during the initial 1,800 dot purchase of that day, Strider told Palumbo that he didn't like to deal with strangers because his drugs had been stolen in the past (T. 397). When Strider returned with the second 10,000 dot batch, he said his source had already sol the other 40,000 dots (T. 398).

Palumbo also testified that once inside the apartment on 4th Street, after appellant had been advised of his rights, Palumbo asked appellant if he had any money or weapons. Appellant replied that he had no weapons, but he had some money. Palumbo asked where it was, and appellant told him it was under the mattress. Appellant asked for the search warrant; Palumbo said he didn't have one, but he intended to get one, and if he took the time to get one, appellant could not be present for the search. Appellant then signed the consent form, and the agent found the $660 intermingled with other money under the mattress (T. 400-401).

At this point in agent Palumbo's direct testimony, the Court once again interjected and conducted its own examination in the prosecution's stead:

THE COURT: When did you buy the 1,800 LSD? What date was that?

THE WITNESS: February 12, your Honor at approximately 4 P.M.

THE COURT: And from whom?

THE WITNESS: From William Brand, David Miley and Strider.

THE COURT: And what did you give for that 1,800?

THE WITNESS: $660

THE COURT: Was that the serialized money you have been referring to?

THE WITNESS: Yes, it is.

THE COURT: Did you say that that $660 was found in Goldstein's apartment?

THE WITNESS: Yes, it was, underneath his mattress.

(T. 403)

Soon after this colloquy, a recess was taken and counsel immediately objected that "today reinforces what your Honor did yesterday and perhaps indicates to the jury that you have a particular view of the facts in this case," (T. 405),...

> it should be clear from all the testimony that we have had in this trial, at the motion to suppress and at the prior trial that the money was the same money. I think the only reference the jury can get is that it is being highlighted in some way or another.
> (T. 406)

Counsel's mistrial motion was denied, the Court explaining that, notwithstanding the suppression hearing and prior trial, it was confused between $650 involved in a November transaction and $600 in the transaction on February 12 (T. 407).

Agent Palumbo testified further that prior to February 12, he'd never heard of appellant or anybody fitting the description of appellant, and neither appellant's name nor his voice, nor anyone fitting his description ever appeared on the various "consent" tapes introduced into evidence at the trial, and he never saw appellant on any of the prior occasions (T. 466-467).

Other government witnesses were surveillance agents. Kieran Kobell engaged in corroborative surveillance on December 13 and January 15, and participated in Wenzler's arrest on February 12. Paul Sennett saw Godinsky come out of the Hotel on January 3 and meet with Robert Bachia in his car which drove to Phoebe's

Bar where Bachia went inside, and then to a restaurant on 8th Street and then to an address at 270 6th Avenue (T. 525-528). He surveilled Vavarigos during certain incompleted transactions of January 8 and 10 (T. 29-30). He observed Bachia leave the comic book store with agents Nieves and Palumbo on February 12, but he lost sight of Bachia in the vicinity of 4th and the Bowery (T. 531). Thomas Sheehan engaged in surveillance on February 6 and 12, and he also lost Bachia in the vicinity of 4th and the Bowery on February 12 (T. 532-534). William Simpson testified that between 4:15 and 4:40 P.M. on February 12, he saw no one enter or leave the vicinity of 56 East 4th Street (T. 536-537).

At the conclusion of the government's case, motions for dismissal were denied, the Court ruling that there was sufficient evidence to permit a jury verdict on both conspiracy and substantive counts and enough evidence to permit the jury to consider hearsay declarations.

> From the proof there is warranted an inference that each of the defendants on trial was aware of and, thus, knowingly further Brandt's ongoing ventures as partners of each other and of Brandt therein. The so-called single transactions with or functioned performed [sic] for Brandt under the circumstances here was sufficient in and of themselves to warrant an inference of knowledge to the extent of Brandt's activities and to scope thereof and williness [sic] to participate therein to a greater or lesser degree.
>
> We are confronted here with more than merely a single delivery, a single possession or a single sale on the part of the defendants respectively. Accordingly, the court rules that the motions directed to the conspiracy count should be denied and also ruled that there has been sufficient evidence to warrant a jury in finding a verdict of guilty of each of the substantive counts that is before the court.
>
> (T. 577-578)

Defendants rested, and their renewed motions were denied (T. 580).

The Court charged the jury:

> You may find a single conspiracy even though there were changes in personnel and activities, providing you find that some of the co-conspirators continued throughout the life of the alleged conspiracy and that the purposes of the alleged conspiracy continued to be those charged in the indictment. The issue turns on whether the proof warrants an inference that the defendant was aware of and, thus, knowingly furthered an overall going venture or partnership.
>
> (T. 732-733)

The Court also gave a Pinkerton charge (T. 740) and prefaced it with,

> There is, furthermore, another method by which you should evaluate the evidence and which would sustain a finding of guilt of the defendant charged on the substantive counts even though the government's proof on the substantive counts was not sufficient as to him to establish all the required elements.
>
> (T. 739-740)

Appellant was found guilty of both the conspiracy and substantive counts and sentenced concurrently to six months on each count.

ARGUMENT

POINT I

APPELLANT'S PRESENCE IN AN APARTMENT DID NOT PERMIT A FAIR PREPONDERANCE FINDING OR A BEYOND A REASONABLE DOUBT VERDICT THAT HE WAS A MEMBER OF MULTIPLE CONSPIRACIES, AND HE WAS PREJUDICED ON THE CONSPIRACY AND SUBSTANTIVE COUNTS BY THE JOINT TRIAL ON SINGLE CONSPIRACY AND PINKERTON THEORIES SUBMITTED TO THE JURY AMID THE PLETHORA OF INADMISSABLE HEARSAY DECLARATIONS.

The presence of appellant, on February 12 in an apartment wherein LSD and "marked" money was found, is the only evidence of his acts which the jury had before it, and from which the jury was erroneously permitted to find his knowledge of, and financial stake in, separate drug sales and attempted drug sales to agents from various and separate sources in November, December and January. Even assuming, arguendo, appellant's involvement in the February 12 LSD sale to the agents through Strider, who was seen leaving the apartment prior to the transfer,* there is absolutely no evidence that appellant had anything to do with any of the prior transactions in the case. At best, those other transactions show multiple conspiracies between Brandt and Starbuck, the government informant, to procure drugs

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*At trial, the only evidence that appellant was involved in the February 12 sale was Strider's comings and goings in the vicinity of the apartment, Strider's being seen leaving the apartment, the discovery in the apartment of the money given to Strider on a previous sale that day, and appellant's admission that he knew the money was there. Other LSD found in the apartment would have no bearing on that sale to the agents and, in any case, Strider told the agents he had no more to give them. Thus, although appellant may have had knowledge of Strider's activities that day, and had his own LSD supply in the apartment (see infra) there was no evidence of actual participation.

for the undercover agents from various sources who had no connection to each other and no stake in the outcome of the separate transactions. Kotteakos v. United States, 328 U.S. 750 (1946). On November 3, Starbuck and Brandt met to discuss future purchases; on November 12, Starbuck and Brandt drove to Woodstock to find a source; on November 23, Brandt gave Starbuck a 3 dot LSD sample; on November 27, Godinsky was present when the agents bought 1,000 dots; on December 5, Lang was present when Starbuck received a sample of THC; on December 13, Flores and Vavarigos were present when the agents bought THC; on December 17, Vavarigos gave the agent a cocaine sample; on January 3, Godinsky was present at the sale of 3,850 LSD dosages; on January 4, Lang gave the agent an LSD sample; and on January 15, Wenzler and Lang procured LSD for the agents. There is nothing in the evidence from which to infer that the scope of each of the participant source's agreements went beyond the particular transaction in which he was engaged, and certainly nothing from which to infer that appellant's speculative involvement in the February 12 transaction, one month later, evinced an intention on his part to further or derive benefit from the transactions that had already taken place. Thus, there were, at best, multiple conspiracies and single transactions, in the classic sense (See Kotteakos, supra), and, not only is the single conspiracy verdict unsustainable, but the case in this form should never have been presented to the jury. United States v. De Noia, 451 F. 2d 979 (2d Cir., 1971); United States v. Santore, 290 F. 2d 51 (2d Cir. 1959); United States v. Koch, 113 F. 2d 982 (2d Cir., 1940) (See counsel's objections prior to trial).

> [the government] may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case... it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could more reasonably be regarded as two or more conspiracies, perhaps with a link at the top... many serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge.....
>
> United States v. Sperling, et al. 2d Cir., decided October 10, 1974 Docket Nos. 73-2363 et seq., slip op. at 5665.

Among the "many serious problems" created once again in this case by the single conspiracy indictment, is the mass of hearsay declarations which became part and parcel of the government's case and which provided the only possible, albeit still speculative, evidence of any link between appellant and the other defendants on trial. As has been argued above, the evidence of appellant's own act, his presence in the apartment (United States v. Borelli, 336 F. 2d 376, 384-387 (2d Cir., 1964); United States v. Russano, 257 F. 2d 712 (2d Cir., 1968)), even together with Strider's comings and goings and the presence of the money and LSD in the apartment of February 12, provides no evidence from which an inference can be drawn of appellant's knowledge and participation in what had gone before in November, December and January. Although such an inference might be drawn when the indictment alleges a single act conspiracy and the defendant has participated only in the consummation stage of

that single act (United States v. Ramirez, 482 F. 2d 807 (2d Cir., 1973)), or when the admissions made by the defendant during the commission of the single act indicate a connection to the common source of the conspiracy (United States v. De Noia, 451 F. 2d 979 (2d Cir. 1971), no such acts or circumstances are present in this case. Instead, what is present are hearsay admissions and declarations, which, insufficient in themselves to make the link, were also improperly submitted for the jury's consideration. The cases which allow a single act to evidence membership in a conspiracy, still require that the inferences of membership be drawn from that act before any co-conspirator hearsay declarations may be considered against the defendant. United States v. Cirillo, 499 F. 2d 872, 884-887 (2d Cir., 1974); United States v. Geaney, 417 F. 2d 1116 (2d Cir., 1964). Since, as we have shown, the acts here do not permit the inference of an overall membership, the declarations, which were so intermixed in the presentation of the government's case, improperly influenced, not only the jury's verdict, but the Court's rulings on the preponderance showing of appellant's membership and, finally, in full circle, on the admissability of those very declarations themselves.* United States v. Dominicis, 332 F. 2d 207 (2d Cir. 1964).

* The Court seemed to focus on the 50,000 dot LSD sale the agents hoped to transact on February 12, as evidence of a large quantity and, therefore, evidence of appellant's membership (T. 580). However, all the evidence concerning this quantity came in the hearsay discussions between the agents and Brandt and between the agents and Strider, and, of course, no such quantity was ever delivered. In any case, the Court's conclusory statements about quantity proving the link, without any reason, does not in itself provide the evidence. In De Noia, supra, quantity was a factor in proving a link to an importation venture.

The linking declarations included Brandt's statements to agent Palumbo on January 3, after the 3,850 dot LSD sale, that soon Brandt would be dealing directly with Godinsky's supplier, Strider (T. 384); Brandt's assurances to Palumbo on February 6, that the 50,000 dots would be coming from the same source, Strider (T. 393); and Strider's conversations with agents on February 12. Of course, even these declarations point to Strider and not beyond him, except as to Strider's declarations on the February 12 sale. That Strider may have purchased the LSD from appellant on February 12 is no proof that he did so on the prior occasions. And, even if it's assumed there was a link between Godinsky, Strider and appellant in the LSD sales, the multiple conspiracy problem remains because there is no link between those sales and the cocaine and THC (PCP) sales and the participant sources involved therein. In any case, all the inferences would have had to be drawn from hearsay, and the non-hearsay evidence being insufficient to permit the court to make a fair preponderance finding, these declarations could and should not have been considered, and the conspiracy verdict resting thereon cannot stand.

Should this court find as it did in United States v. Borelli, supra, that the jury could have found a single conspiracy, a reversal is still mandated as it was in Borelli because the charge to the jury did not focus attention on the scope of appellant's particular involvement in it, because it charged that knowledge

of the other transactions was enough to prove stake and participation,* and because it included a Pinkerton charge which had the effect of permitting an unsupported conspiracy charge to influence the jury's verdict on an unrelated substantive charge, itself unsupported by sufficient evidence.

Since the evidence was, at the least, ambiguous as to appellant's involvement in the overall conspiracy, the failure of the court to specifically apprise the jury of their task to determine appellant's involvement or non-involvement in the entire overall scheme as charged upon evidence of more than mere knowledge that other transactions may have taken place, notwithstanding proof against him of participation in one otherwise separate transaction, and notwithstanding proof against any other defendant of membership in the overall scheme, requires reversal of the conviction. The danger of "over-extension of a legal doctrine" noticed in Borelli, supra, and United States v. Kelly, 349 F. 2d 720 (2d Cir., 1965) and reiterated again in United States v. Sperling, supra, was not avoided in this case.

Appellant was further prejudiced on both counts by their being tried together and topped off with the criticized Pinkerton charge. United States v. Sperling, supra at 5666-

*The court charged, "the issue turns on whether the proof warrants an inference that the defendant was aware of and, thus, knowingly furthered an overall going venture or partnership." (emphasis supplied) (T. 733). This Court has held that knowledge alone is insufficient to prove membership in an overall conspiracy. United States v. Cianchetti, 315 F. 2d 584 (2d Cir., 1963); United States v. Potash, 118 F. 2d 54 (2d Cir.) United States v. Garguilo, 310 F. 2d 249 (2d Cir, 1962).

5667. * The substantive count charged appellant alone with the possession of the 4,000 dosage units of LSD found in the apartment where he was arrested. This count was not charged as an overt act in the conspiracy; indeed, the evidence clearly showed that its possession could not be in furtherance of any conspiracy. There was no evidence to connect its possession to the conspiracy as charged and, as far as that conspiracy was concerned, according to Strider's statements to the agents that there was no more LSD available to them on February 12, those 4,000 dosage units were specifically withheld or withdrawm from the conspiracy. Thus, there was no way that the jury could have found appellant's possession of these 4,000 units to be in furtherance of the conspiracy, and the Court's Pinkerton charge permitting them to do so was plain error as a matter of law.

Furthermore, the evidence on the substantive count itself was far from overwhelming, and the Pinkerton charge, together

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*We would like to note, however, that the charge based on Pinkerton v. United States, 328 U.S. 640, 645 (1946) here given to the jury by Judge Pollack, should not be given as a matter of course. .... it was used here in circumstances quite different from those that gave it birth. In the Pinkerton case, there was no evidence that Daniel Pinkerton had committed the substantive offense for which he had been convicted, but it was clear that the offense had been committed and that it had been committed in furtherance of an unlawful conspiracy of which he was a member... In this case, however, the inverse is at work. The evidence pf various substantive offenses, many discrete instances of which are charged to individual appellants....was great; it was the conspiracy that in some instances must be inferred largely from the series of criminal offenses committed."

with the intermingling of the conspiratorial charges, other separate transactions of co-indictees, and hearsay declarations undoubtedly prejudiced the jury's verdict on the substantive charge as well as the conspiracy charge. United States v. Cantone, 426 F. 2d 902 (2d Cir., 1970) cert. den. 400 U.S. 827; United States v. Branker, 395 F. 2d 881, 888 (2d Cir., 1968); United States v. Vaught, 485 F. 2d 320 (4th Cir., 1973). The evidence on the substantive count was only appellant's presence in a storefront apartment not shown conclusively, or beyond a reasonable doubt, to be exclusively owned, rented or occupied by appellant, and to which Strider, the man referred to by the other parties as the source of the LSD, obviously had access. Mere presence in an apartment, even where the defendant is shown to be a co-leasee with knowledge, is insufficient to prove possession, absent some other evidence of active participation. United States v. Martin, 483 F. 2d 974 (5th Cir., 1973); United States v. Holland, 445 F. 2d 701 (D.C. Cir., 1971); United States v. Kearse, 444 F. 2d 62 (2d Cir., 1971); United States v. Lopez-Ortiz, 492 F. 2d 109 (5th Cir., 1974) (presence plus flight is insufficient evidence of possession). Whatever evidence there was on this count, however, was the only evidence against appellant, and if his participation in the conspiracy was to be inferred, it was to be inferred "back" from the evidence on the substantive count, and this is the "inverse" of the situation in the original Pinkerton case, and an improper situation for the Pinkerton charge.

United States v. Sperling, supra. Since the evidence on the substantive count was mere presence and, therefore, insufficient, the giving of the improper charge on top of the insufficient evidence mandates reversal of the substantive count as well as the conspiracy count.

In any case, a reversal of the conspiracy count for the reasons argued, should require, at the least, a remand for resentencing on the substantive count, since from the Court's remarks during trial on the motions to dismiss, the presence of both counts in the case probably influenced the imposition of a jail term. United States v. Sperling, supra at 5669.

POINT II

APPELLANT WAS DEPRIVED OF A FAIR TRIAL WHEN THE COURT ELICITED, REPEATED AND HIGHLIGHTED IN ITS OWN EXAMINATION OF WITNESSES THE MOST ARGUABLY DAMAGING EVIDENCE AGAINST HIM.

Appellant was deprived of a fair trial when the trial judge took on the role of the prosecutor and, in two crucial instances, elicited and highlighted the most arguably damaging evidence against appellant. As we have shown in POINT I, supra, there was little evidence, apart from speculative inferences, that appellant had possession of the 4,000 units of LSD charged in the substantive court, because the evidence showed only that he

was present in the apartment. Whether appellant lived there, and with whom, who was the lessee of the apartment, or the owner of the building, and who, in addition to Strider, had access to the storefront apartment, were all missing from the government's evidence. Indeed, nothing on these matters had been elicited in the direct examination of the witness, agent Nieves, and on cross examination he was asked only if he had seen appellant in physical possession of drugs. At the close of cross, and in the nature of government redirect, the Court took over and attempted to elicit the agent's opinion, "did it look like a single occupancy or multiple or double occupancy?" When counsel objected to this, the Court asked the same question, again eliciting an opinion, "what did you observe as to the nature of the occupancy, if anything?" The agent answered, "it appeared to be Goldstein's apartment alone." The Court asked a series of questions about the bed in the apartment, and about any names on the bell or the door, and finally, after the agent gave his opinion, the Court elicited testimony about an admission by appellant, "Well, he stated that he lived there." (T. 333-334). This latter testimony was the only such evidence about appellant's relationship to the apartment, and it was a statement made before any Miranda warnings had been given. Having been elicited by the judge it could not but stand out in the jury's mind as conclusive on the issue of appellant;s constructive possession as later charged by the Court. The evidence took on an importance, perhaps unintended by the court, beyond the normal inferences that could be drawn from the mere fact that appellant lived there (See cases cited in POINT I, supra.)

The Court again assumed the prosecutor's role in the middle of the direct examination of agent Palumbo, and once again the effect of this court examination was to impress on the jury's mind certain evidence it would need to remember in order to find appellant's participation as Strider's supplier in the transfers made to the agents on February 12, and hence, his possible role in the conspiracy. In this instance, that the $660 found under the mattress in the apartment was the same $660 paid to Strider for the first 1,800 dosage sale on February 12, had already been elicited by the prosecutor in the testimony of the agent. The Court, however, interrupted direct examination and asked the series of repetitive questions underlining the facts: that the agent bought the LSD from Strider who was introduced by Brandt, that $660 was paid for it, and that money was serialized and,

THE COURT: Did you say that that $660 was found in Goldstein's apartment?

THE WITNESS: Yes, it was, underneath his mattress.

(T. 403)

When counsel objected here, the Court, surprisingly, said it was merely clarifying for itself which money was which, even though there had been a suppression hearing, a complete former trial, and witnesses on the instant trial who gave testimony about the money found under the mattress. Whether intended, or not, the jury, who had not heard the evidence before, was given a clarification from the bench and a direction to consider this evidence very heavily in their deliberations.

In both the above instances, the judge elicited evidence for the prosecution before the jury, and in both instances, the evidence was either the only testimony on the subject, or was the most potentially harmful to the defense.

Although, of course, there is no bar to a federal judge's clarifying facts and examining witnesses for that purpose, there is a bar to his highlighting exclusively on the side of one party what ptherwise needs no clarification and to his supplementing for that same party examination designed to make the case for that party.

> Even if the judge thinks the performance of the Assistant United States Attorney has been inadequate... it is not his business to step in -- there is too much danger that the jury will regard him as associated with the prosecution and be swayed accordingly.
>
> United States v. Fernandez, 480 F. 2d 726, 737 (2d Cir. 1973)

The recent D.C. circuit decision in United States v. Liddy, decided November 8, 1974, No. 73-1565, is instructive on this point. In that case the trial judge examined a witness on behalf of the defense after the defense had declined to examine the witness at all. The defense had thus left standing other testimony which supported the prosecution's theory that the defendant has masterminded the crimes involved. The thrust of the trial court's questioning was an attack on the credibility of a prosecution witness and was designed, "to prevent pollution by perjury of the trial he was conducting." slip. op. at p. 20. And, the examination did not elicit new evidence or highlight anything damaging to the defense. No wonder, the Circuit was

loathe to reverse on behalf of the defense. The Court was careful to warn, however, "in general the trial judge would do better to forego direct questioning and the possible impact on his objectivity, since he has available the alternative of suggesting to counsel the questions he believes ought to be pursued." slip. op. at p. 21 n. 31 (and cases cited therein). The Court went on to say,

> In this case we do not have the situation that commonly leads to a claim of judicial excess, wherein the trial judge creates an appearance of partiality by continued intervention on the side of one of the parties...
>
> slip op. at p. 17.

We submit that in this case such a situation was presented, because, although the instances were only two, they came at the most sensitive spots in the government's case during a relatively short trial, were clearly designed to highlight prosecution evidence and bring forth new matter on behalf of the prosecution, and clearly informed the jury of the Court's leanings in the case. Appellant was thus deprived of a fair trial, and the judgment should be reversed.

POINT III

IN THE ABSENCE OF PROBABLE CAUSE, WARRANT, EXIGENCIES, AND VOLUNTARY CONSENT, THE INTRUSION INTO THE APARTMENT, ARREST AND SEARCH THEREIN WERE VIOLATIVE OF THE FOURTH AMENDMENT.

Since appellant's consent to search the apartment came after six plainclothes agents forced their way into the apartment,

some with guns drawn; and after the agents scuffled with appellant, who was then handcuffed and taken from the vestibule of the one room apartment into the main part of the apartment and forcibly sat down there; and after the agents were seen by him to go through the apartment, and after he was told by the agents that they intended to get a warrant and that if they did, he wouldn't be present for the search, the resultant consent was involuntary as a matter of fact and law, "an instance of submission to official authority under circumstances pregnant with coercion." United States v. Mapp, 476 F. 2d 67, 77 (2d Cir., 1973). Appellant had demanded a search warrant and didn't accede to the search until the agents, who were already making initial cursory search maneuvers, indicated that their getting one was a formality and that he couldn't be present for the search if they took the time to get one. Certainly, if prompty arraigned after the arrest and admitted to bail, appellant would have had every right to be in the apartment during the search. Thus, absent "well founded advise of a law enforcement agent" about the consequences of the refusal of consent, where the advice is misleading in an attempt to secure the consent, and where the victim of the search is given the impression that the house will be searched anyway, the resultant consent is not a free and knowledgeable waiver of a constitutional right. United States v. Faruolo, 2d Cir., decided October 29, 1974, Docket Nos. 74-1350, 1802, slip. op. 5833-34 (consent voluntary because advice of agent was "well founded" when he told victim he need not consent and that, absent consent, house would not be searched).

In this case, appellant was given the distinct impression that there was no question that the agents would simply apply and receive a search warrant, that there was no discretion, and that his rights were minimal and ineffective; such police tactics result in presenting the citizen with a fait accompli under the color of the badge and render illusory the rights under the Fourth Amendment. United States v. Faruolo, supra (concurring opinion); Bumper v. North Carolina, 391 U.S. 543 (1968). This, together with the overwhelming display of agents and guns, and the overwhelming application of physical compulsion in subduing appellant, renders the consent involuntary, and the evidence illegally seized. United States v. Marshall, 488 F. 2d 1169 (9th Cir., 1973).

Even if this Court should find the consent voluntarily given, the search is nonetheless illegal since the consent was secured and the search made upon an arrest without a warrant or probable cause in exigent circumstances. As this Court said in Faruolo, supra, at 5833-5834, when the agents seek the consent of the victim (and when consent is the basis put forth by the government at the suppression hearing), "there is an admission by the officer that he has no right to proceed unless the defendant consents..." There was thus an admission in this case that, at least, a warrant was otherwise required. No warrant could have been obtained, however, because (1) the agents had no probable cause to arrest appellant on the word alone of Strider whom they had no reason to believe was reliable, because (2) there was no probable cause to believe contraband was to be found in the

apartment since Strider had told them there was no more to be had, and because (3) even if there was probable cause to arrest appellant, his removal from the vestibule to the main part of the apartment was done for the purpose of searching incident to the arrest and was not necessitated by it.

Strider was not a reliable informant, nor was his information that appellant had given him the drugs independently corroborated. The agents knew nothing about Strider other than that he said he would deliver 50,000 dots of LSD, which proved to be false. He said that Mel would meet him at Iggy's Corner, which proved to be false. The only corroboration they had of his information was that he had been seen coming out of the storefront apartment to which he directed the agents, and that he was giving his information from supposed firsthand observation. But, since there was absoluely nothing to make believable his shifting the guilt onto "Mel," and everything to indicate, on the contrary, that he was lying for just that purpose, the agents had no probable cause for the arrest of "Mel". United States v. Acosta, 5th Cir. decided October 10, 1974, 16 Cr.L.2110; Harris v. United States, 403 U.S. 573 (1970). The statement against penal interest exception enunciated in Harris, supra, does not apply here, because here it was within Strider's penal interest to shift the blame and it added nothing to his own guilt already established by his sale to the agent. In Harris, the Court said, " Concededly, admissions of crime do not always lend credibility to contemporaneous or later accusations of another," but when the informant's admissions are

the only evidence against him when he talks to the police and when he admits to long term criminal enterprise, that may be taken as indicative of reliability. 403 U.S. at 584. Those circumstances are not presented here.

Even if there was probable cause to arrest appellant, there was no probable cause to believe that drugs were to be found in the apartment, because the only information the agents had from Strider was that the 10,000 dosages had exhausted the supply. United States v. Marshall, supra at 1189; United States v. Connolly, 479 F. 2d 930 (9th Cir., 1973) (agents only knew that some drugs had previously come from the house). Appellant's arrest was completely effectuated at the door of the apartment, in the vestibule created by the erection of a 3-5 foot partition that concealed the rest of the apartment. The agents, therefore, had no right or reason to take him back into the back of the apartment, other than to place themselves in a position to search incident to the arrest or to make plain view seizures. Shipley v. California, 395 U.S. 818 (1969); cf. United States v. Atkinson, 450 F. 2d 835, 841 (5th Cir., 1971) cert. den. 406 U.S. 923. The Shipley decision made it clear that the search incident exception applies only to the "immediate" vicinity of the arrest. 395 U.S. at 819. Although in Shipley the arrest was on the street and the police took the defendant back into the house, the situation is analagous here. The arrest was finished and completed in the vestibule, an area that was obviously and affirmatively segregated from the rest of the apartment. There was an expectation of privacy in this

partitioned arrangement that was violated for no reason by the agents in this case. It was as if they had searched another room. United States v. Artieri, 491 F. 2d 440 (2d Cir, 1974). Thus, the agents had no right to be in the back part of the apartment, and their seizures there, plain view or on consent or otherwise, are not justified.*

Finally, even if there was probable cause for the arrest of appellant, there were no circumstances justifying the warrantless arrest, intrusion into the apartment, and the search thereof. The agents had no reason to believe there were drugs in danger of destruction (United States v. Connolly, supra; United States v. Marshall, supra), and no reason to believe that, with the apartment and appellant under surveillance during the short time it would take to get the warrant, he would escape their clutches. Coolidge v. New Hampshire, 403 U.S. 443 (1971); United States v. De Berry, 2d Cir., November 7, 1973 (Docket Nos. 73-1283, 1353, slip. op. at 5571 n.s.; United States v. Bradshaw 14 Cr. L. 2336, 4th Cir., decided January 9, 1974.

*Even if their presence there be justified, the tin foil packet could not be seized on plain view grounds since it was in itself an innocent looking article. United States v. Shye, 473 F. 2d 1061 (6th Cir., 1973).

POINT IV

PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE 28 (i), APPELLANT, GOLDSTEIN RESPECTFULLY INCORPORATES BY REFERENCE ANY ARGUMENTS RAISED BY CO-APPELLANTS INSOFAR AS THEY ARE APPLICABLE TO HIM.

CONCLUSION

FOR THE ABOVE STATES REASONS, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED, OR, ALTERNATIVELY, A NEW TRIAL GRANTED.

Respectfully submitted,

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Of Counsel

Received 2 copies of the within
Brief for Appellant
this 24 day of Nov 19 21.

Sign

For: Hon Paul Curran Esq(s).

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